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No. 86-1378

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

HANIL BANK,
Petitioner,

VS.

CARLYLE MICHELMAN, TRUSTEE,
Respondent.

REPLY OF HANIL BANK TO OPPOSITION OF CARLYLE MICHELMAN, TRUSTEE TO HANIL BANK'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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A. STATEMENT OF THE CASE.

1. The opposition of the respondent Carlyle Michelman, Trustee, ("Michelman") to Hanil's petition for writ of certiorari ("Opposition") contains several allegations which could give this Court a misimpression of what the Ninth Circuit has done in this matter. In one instance, Michelman seeks to minimize his failure to appear at trial by claiming that the bankruptcy court's normal practice was to use the trial date as a mere status conference. Opposition, p. 3, lines 9-14 and p. 6, lines 13-16. There is no evidence in the record to support such a statement. In fact, when Michelman's counsel made that assertion to Judge Ordin at the first hearing on

Michelman's motion to clarify that the judgment of dismissal was without prejudice or to vacate the judgment ("Motion to Clarify"), Judge Ordin objected saying, "Wait a minute. We try almost everything the first time around." E.R.[1] 661. Judge Ordin moved his cases to trial promptly and Michelman was well aware of that fact. E.R. 94.

2. Michelman would also have this Court believe that Judge Ordin always intended the judgment of dismissal to be without prejudice and so ruled. Opposition, p. 8, lines 11-15. This Court can get a much better understanding of Judge Ordin's view of his original judgment of dismissal from the following exchange which occurred on January 6, 1983 at the first hearing on Michelman's Motion to Clarify:

> "THE COURT: What really is the issue? Why didn't you come in here immediately and say, wait, it's been an error, we did some things, we want to be relieved; let's go from here; there's been no real delay; move on; here we go. Different ballgame; isn't it?
>
> MR. WEINSTEIN: The answer to that, your Honor, is that our understanding was, and I think the judgment says, that the dismissal was one without prejudice. So, there was no real reason to have this motion until the question was raised, and all of a sudden we found out.
>
> THE COURT: Wait a minute. I don't remember the judgment said without prejudice.
>
> MR. WEINSTEIN: No, it didn't. It does not have that language.

---

[1]"E.R." refers to the excerpt of record filed in the court of appeals.

THE COURT: It sure didn't. *It said dismissed. When an adversary is dismissed in trial context that presumption is it is with prejudice.* That's what the cases seem to say; don't they, Mr. Minnick?

MR. MINNICK: Yes, your Honor.

THE COURT: *That's the way I understood the law.*

• • •

THE COURT: But it was also one you must be charged with the knowledge of from the time the dismissal was entered. It took you ten months to say, hey, maybe it was with prejudice. I don't understand that. The trustee's attitude is impossible to understand. This was the same trustee that didn't contest the vacating of the stay one day when he was in open court with an opportunity to do so." (emphasis added) E.R. 655-656.

These and numerous other statements by Judge Ordin help explain why Judge Ordin could never bring himself to sign an order stating that he had always intended to make the dismissal without prejudice. They also explain why United States District Judge Stotler ruled that it was clearly erroneous for Bankruptcy Judge Ayer to determine that Judge Ordin had originally intended the judgment of dismissal to be without prejudice.

3. Michelman summarily states that Hanil has not been prejudiced by the belated change in the judgment of dismissal. By denigrating the damage to Hanil, Michelman hopes this Court will reject review of this case and thus never see the record which establishes the prejudice to Hanil beyond question.

Judge Ordin did not buy Michelman's claims that Hanil had not been prejudiced. At the January 6, 1983 hearing

Judge Ordin stated his concerns about Hanil's business decisions in reliance on the judgment and the problems of preparing for stale litigation:

> "THE COURT: Mr. Weinstein, you think you could fairly say that if your client had taken steps during the first ten days of March to set aside the complaint — that dismissal, that Hanil Bank would have proceeded in the same fashion to make the same commitments, the same financial expenditures as it did when your client did not take any steps to correct —
>
> MR. WEINSTEIN: Your Honor, —
>
> THE COURT: Are you in a position to make that representation as a fair minded lawyer?" ER. 659-660.
>
> • • •
>
> "THE COURT: Well, they got a dismissal of the cross complaint. That was the end of it. And now they went ahead and arranged their affairs in whatever way they felt would be in the best interest of the bank. All right.
>
> (Off the record.)
>
> THE COURT: Had there been a motion attacking it filed within a reasonable period, three or four weeks, perhaps, don't you think that the bank and its counsel would have addressed themselves to meeting the challenge and gathering the evidence and putting their statements together and interviewing their witnesses, and doing things which they now have not done for 10½ months. Don't you think that is a fair result of your waiving and delay?
>
> MR. WEINSTEIN: Your Honor, they have not done it quite presumably. But they also have not been

under any requirement to do it until available to them.

THE COURT: Are you able to tell me that 10½ months later you can do the same kind of preparation to meet the challenge that you can when everything is fresh at the time the matter is first called?

MR. WEINSTEIN: I suppose if we assume that certain memories have been clouded or perhaps some given individual have (sic) left town or died.

THE COURT: Or that transactions have occupied the time or attention of the witnesses of things that were fresh in their minds when they thought they were going to testify then were now clouded or forgotten about, other matters have occurred. Don't you think there's really a fact, or that as a trial lawyer I can't believe you cannot give some credance to their problem." E.R. 662-663.

Judge Ordin was acutely aware of the prejudice to Hanil. Since prejudice is a key element in determining the availability of relief under Rule 60(b), Judge Ordin never could justify that remedy. Neither could the District Court. The Ninth Circuit simply chose to ignore the issue entirely.

B. ARGUMENT.

1. Michelman's statement of the proper use of Rule 60(a) in the Ninth Circuit graphically displays the need for this Court to rectify the situation. Michelman argues that the Ninth Circuit permits Rule 60(a) to authorize a change in a judgment if evidence in the record will support the change. Opposition p. 16, lines 6-11. There is no restriction on the type of change which can be made nor is there any limit on when it may be made.

Contrary to Michelman's allegations, the First, Fifth and Eleventh Circuits do not permit such a result even if there is evidence in the record to support it. In *Mullins v. Nickel Plating Mining Co., Inc.,* 691 F.2d 971 (11th Cir. 1982), the Eleventh Circuit noted that the trial court had expressly stated in its earlier judgment that execution could issue even though it was a partial summary judgment. 691 F.2d at 973. In spite of that clear evidence in the record of the trial court's intent, the court of appeals rejected the trial court's effort to use Rule 60(a) to correct the judgment so that it could formally be enforced. The relief could not be permitted because it affected substantial rights of the parties. *Id.*

2. The Ninth Circuit's position offers no solution for having erased Hanil's right to appeal. Michelman boldly states that Hanil has not lost its right to appeal because Michelman believes Hanil would have lost the appeal any way. Opposition, p. 15, lines 3-10. Hanil may appeal as a matter of right. 28 U.S.C. § 1291. 15 Wright, C., A. Miller & E. Cooper, Federal Practice and Procedure, Section 3901, p. 398 (1976). The courts have carefully protected against judicial attempts to coerce a party not to appeal. *North Carolina v. Pearce,* 395 U.S. 711, 724, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969); *Clark v. Universal Builders, Inc.,* 501 F.2d 324, 341-342 (7th Cir. 1974) cert. den. (1974); 15 Wright, C., A. Miller & E. Cooper, Federal Practice and Procedure, Section 3901, p. 399 (1976). In this case the court did not coerce Hanil not to appeal, the court removed any opportunity for Hanil to appeal.

3. There is so little support for the Ninth Circuit's use of Rule 60(a) to justify the relief granted in this case that Michelman seeks to offer different theories to support the Ninth Circuit's action. For example, Michelman refers to the power of a court to interpret its judgments. Michelman's citation of *United States v. 60.22 Acres of*

Land, etc., 638 F.2d 1176 (9th Cir. 1980), makes no reference to Rule 60(a). It is merely a case where the court sought to interpret an earlier condemnation judgment when deciding whether to permit evidence to be presented on certain issues during the course of trial. The effect of the earlier judgment was clear from its face and the court ruled accordingly. The other cases cited by Michelman are similarly inapplicable where, as here, the effect of the judgment of dismissal is unambiguous.

The Ninth Circuit was not faced with interpreting the effect of the original judgment of dismissal. Even the Ninth Circuit readily admitted that the judgment of dismissal was with prejudice as is required by Rule 41(b). The only issue is whether the Ninth Circuit can authorize a change in the effect of that judgment of dismissal through the use of Rule 60(a).

4. Michelman's Opposition dramatizes one of the crucial defects in the Ninth Circuit's use of Rule 60(a). The Ninth Circuit never deals with the prejudice to parties resulting from the changing of judgments at any time under Rule 60(a). The case of *Pattiz v. Schwartz*, 386 F.2d 300 (8th Cir. 1968) cited by Michelman for the use of Rule 60(a) expressly stated that: "No prejudice could possibly result from what the court did." 386 F.2d at 303.

Michelman hopes that this Court will not focus on the prejudice to Hanil from the Ninth Circuit's ruling. The record below is replete with evidence of Hanil's change of its position in reliance upon the judgment of dismissal. However, Michelman would have the Court believe that prior to the judgment of dismissal Hanil obtained regulatory approvals to do everything it did after entry of the judgment of dismissal. Such is not the case.

Hanil did take steps to obtain approval from the California State Banking Department to bid on the pledged

stock of the First State Bank of Southern California ("FSB") at the foreclosure sale. E.R. 138. Such approval was necessary if Hanil wanted to credit bid at the sale (E.R. 331-322) to protect the value of the FSB shares and reduce Hanil's loan loss. E.R. 502. If Hanil acquired the FSB stock at the foreclosure sale, Hanil would have at least two years to hold the FSB stock before deciding whether to operate FSB or sell the FSB stock. E.R. 322. If Hanil elected to operate FSB, Hanil would need to obtain the approval of the Federal Reserve Board of Governors to become a bank holding company. *Id.* Hanil did not seek Federal Reserve Board approval until several months after the judgment of dismissal when Hanil believed the judgment of dismissal had terminated Michelman's claims to the FSB stock. E.R. 502-505.

If Hanil's change of position is not enough prejudice, Judge Ordin accurately identified the prejudice to a party trying to prepare a lawsuit months and now years after the events in question. All of this could have been avoided if Michelman truly wanted to pursue his claim. All Michelman had to do was challenge the effect of the judgment of dismissal promptly with the trial court or on appeal.

5. Michelman seeks to minimize the effect of the Ninth Circuit's use of Rule 60(a) to completely abrogate the purpose of Rule 41(b). Not even the Ninth Circuit could avoid admitting that Rule 41(b) made the judgment of dismissal with prejudice. Nevertheless, Michelman offers an unsupportable view of Rule 41(b) to avoid its application in this case.

Michelman argues that the case of *La Societe Anonyme des Parfums Le Galion v. Jean Patou, Inc.*, 495 F.2d 1265 (2nd Cir. 1974), permits a search of the entire record to see if Rule 41(b) requires a dismissal with prejudice.

While the Second Circuit remanded the matter for further investigation of the effect of the dismissal, the Second Circuit expressly directed the trial court to look at two sources. 495 F.2d at 1275 n. 12. One source was any local rule in effect at the time of the entry of the judgment of dismissal which might have stated that the judgment should be without prejudice. The other source was a prior order expressly referenced in the dismissal order and which set out the conditions of the dismissal. In either event, the parties would have an express statement of the court's intent of which they should be on notice. Neither approach suggests the parties are to comb through transcripts in order to divine what may have been intended. Rule 41(b) was adopted to avoid just such uncertainty.

No one would dispute that a local rule may provide that any judgment of dismissal is without prejudice unless otherwise stated. Such a local rule is merely an express statement by the court that a dismissal is to be without prejudice. Rule 41(b) recognizes and approves such express statements.

The case of *United States v. Thompson,* 114 F.Supp. 874 (S.D.N.Y. 1953) is no different. The local rules provided that a dismissal was without prejudice. As a result, the local rule prevented Rule 41(b) from making the dismissal with prejudice. *Zaroff v. Holmes,* 379 F.2d 875, 877 (D.C. Cir. 1967) also deals with the interpretation of local rules in determining the prejudicial effect of a dismissal.

None of this is relevant here. Even Michelman admits that the applicable local rules at the time of the judgment of dismissal did not state that such a dismissal should be without prejudice. Lacking any express statement that the dismissal is without prejudice, the United States District Court and the Ninth Circuit both agreed that the judgment of dismissal was with prejudice under Rule 41(b).

C. CONCLUSION.

This Court has yet to give guidance on the proper use of Rule 60(a). Litigants and the courts need to know the standards for granting Rule 60(a) relief so as to maintain the integrity and reliability of federal court orders.

DATED: April 1, 1987.

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On April 1, 1987, I served the within Reply Brief in re: "Hanil Bank vs. Carlyle Michelman" in the United States Supreme Court, October Term 1986, No. 86-1378;

on the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows;

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All Parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on April 1, 1987, at Los Angeles, California

Ce Ce Medina

CE CE MEDINA